ENFORCEMENT OF ANTITRUST PROSCRIPTIONS AGAINST PRICE DISCRIMINATION AND PRICE CUTTING BY CHAIN STORES—THE A & P CASE

On November 1, 1955, the Antitrust Division of the Department of Justice filed a civil antitrust suit and a criminal information against Safeway Stores, Incorporated, charging them with violation of the Sherman and Robinson-Patman Acts.[1] The complaint and the information allege that Safeway has attempted to monopolize the retail grocery business in certain cities in Texas and New Mexico by establishing arbitrary sales quotas for each of its stores in these areas. They charge that Safeway has sought to achieve these quotas, amounting to from twenty-five to fifty per cent of the total retail grocery business of the areas, by selling below invoice costs to destroy competition and that Safeway has recouped the losses thereby incurred, by the sale of identical items at higher prices in stores in the same area where competition was less severe.[2] The civil complaint prays for an injunction against the continuance of these practices.[3]

The progress of this litigation will be followed with intense interest both by chain grocers and by their opponents, for it reopens a highly controversial phase of antitrust enforcement that has lain quiescent since the conviction of A & P in 1946[4] on substantially the same charges[5] and the entry of a consent decree in the subsequent civil suit. The Government's theory of the antitrust violation of Safeway will be closely scrutinized in the light of the A & P case bcause no rule of thumb for delimiting legitimate from illegal practices presently exists. The Safeway litigation, therefore, may clarify questions raised by A & P both as to the nature of the illegality of price discrimination and price cutting and as to the theory and policy behind their proscription. It may settle an area of antitrust enforcement about which there has been much controversy for the past ten years.

The novelty of the A & P prosecution was the application of the Sherman Act instead of the Robinson-Patman Act to circumscribe the activities of chain stores. Prior to A & P, the Sherman Act had been used almost exclusively to attack monopolistic consolidations of manufacturers which had the power to raise prices and exclude competition. Judged by these criteria, A & P was theoretically a perfect competitor in that its integrated operations tended to encourage competition by lowering prices

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1 United States v. Safeway Stores, Inc., et al., Cr. 9564, Cr. 9584, Civ. 3173, CCH Trade Reg. Rep. (Current Ct. Dec.) IP 66,207 (Nov. 1, 1955).

2 *Ibid.*

3 *Ibid.*

4 United States v. N. Y. Great Atlantic & Pacific Tea Co., 67 F. Supp. 626 (E. D. Ill. 1946), *aff'd*, 173 F. 2d 79 (7th Cir. 1949); Civil No. 52-139, S.D.N.Y., Sept. 15, 1949; Consent Decree, Jan. 19, 1954.

5 See DIRLAM AND KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY (Cornell University Press, Ithaca, New York, 1954), pp. 77-81.

and passing on the benefits to the consumer.[6] Practically, however, the courts found that A & P abused its integration and, by destructive price cutting designed to increase its own volume, eliminated competition by subsidizing below-cost sales with profits accumulated in other phases of its coordinated operation.

The controversy began with the question of whether A & P should have been prosecuted at all for these practices; the roots of the problem lay in considerations of public policy. Chain stores from their inception were a threat to the small retailer. By the integration of manufacturing, wholesaling, and retailing activities, they achieved mass buying power which lowered or eliminated certain standard costs and afforded them the capacity to cut prices to a level where the ability of the independent merchant to compete was seriously threatened.

Because of their phenomenal growth in the last three decades, the large grocery chains have become the target of increased political investigation and legislative attack. In 1929 the United States Senate became concerned with the monopolistic implications of these vertically and horizontally integrated companies and ordered the Federal Trade Commission to undertake a comprehensive investigation of both corporate and voluntary chains to determine the legality of their operations and the adequacy of the existing legislation. The final report of the Commission, covering all phases of chain store activity, was completed in 1934; its major dividend was the Robinson-Patman Act of 1936, the so-called anti-chain store bill, which amended Section 2 of the Clayton Act of 1914. The original provision had been designed to prohibit the mediate effects of economically unjustified price discrimination by large sellers which threatened competition; the amended provision was aimed at the immediate goal of affording the corner grocer an equality of rights, benefits, and privileges by outlawing the preference the chains had enjoyed from special discounts and bonuses and from secret rebates which they exacted by their unequaled buying power.[7]

The Robinson-Patman Act added specific proscriptions. Section 2 (c), for example, prohibited payments of brokerage or allowances in lieu of brokerage except for actual services rendered by a legitimate agent in the consummation of a sale. It had been an easy matter for the chains to get shippers and producers to acquiesce in the payment of such allowances to employees, agents, or corporate subsidiaries of the chains. On their face, such transactions carried the consent of the seller; but, under the guise of brokerage, they created revenues which directly benefited the chains and reduced retail prices by a means which independent competitors could not employ.

To avoid the specific proscriptions of Section 2 (c), A & P switched

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6 Fulda, *Food Distribution in the United States: the Struggle Between Indepndents and Chains,* 99 U. PA. L. REV. 1051, 1127 (1951).

7 H. R. Rep. No. 627 (Judiciary Committee), 63rd Cong., 2d sess.

its purchasing activities to so-called "net buying." Its nationally integrated brokerage offices continued to derive the same price advantages through purchasing that it had obtained before the passage of the Robinson-Patman Act, but now at a price which reflected the savings accruing from *not* having to pay brokerage.

A & P interpreted this section as permitting it to receive allowances which reflected cost savings to its suppliers who were saved brokerage expenses by selling to A & P. The Federal Trade Commission, however, disagreed,[8] and the Court of Appeals for the Third Circuit, in sustaining a cease and desist order, held that all brokerage allowances in any form were illegal *per se*, regardless of services rendered in lieu of brokerage.[9]

Its maneuverings within the framework of the Robinson-Patman Act having been curtailed, A & P removed its operations from the sphere of practices specifically proscribed in the act by shifting its purchasing activities to sellers who did not use brokers and who could thus legitimately offer one low price to A & P which did not bear the burden of such a charge. Since the majority of A & P's suppliers dealt through brokers for substantial portions of their sales, it was necessary for A & P to induce their suppliers to abandon purchasing through brokers. In the majority of cases, suppliers threatened with the loss of A & P's custom, submitted to the new plan, often at substantial inconvenience and in some cases at significant financial sacrifice.

In addition, A & P, Safeway, Kroger and others, attempted to secure large discounts and advertising allowances from their suppliers, often by threat of withdrawal of patronage and of entering the manufacturer's own field of operation. In each case, however, technical compliance with the requirements of the Robinson-Patman Act resulted in proceedings by the Department of Justice under the Sherman Antitrust Act. In January, 1943, the Antitrust Division returned indictments against Kroger and Safeway in the United States District Court in Kansas City, Kansas. Both were charged, the Attorney General said, with

> engaging in various unlawful methods of doing business for the purpose of injuring or destroying independent competition. These methods include the obtaining of domination in selected areas by subsidizing underselling activities which were discontinued following the disappearance of independent competition.[10]

Both companies avoided litigation of the charges and a test of the efficacy of the Sherman Act as a weapon of antitrust enforcement against price

[8] In the Matter of the Great Atlantic & Pacific Tea Co., 26 F.T.C. 486, 513 (1938).

[9] The Great Atlantic & Pacific Tea Co. v. The Federal Trade Commission, 106 F. 2d 667 (3d Cir. 1939), *cert. denied,* 308 U. S. 625 (1940).

[10] Statement by Assistant Attorney-General Sonnett, reported in CCH Trade Reg. Rep. (1948-1951) ¶61,113 and ¶61,124.

discrimination, by pleading *nolo contendere*. Safeway was fined $40,000 and Kroger, $20,000.[11]

On February 26, 1944, the Antitrust Division filed a criminal information against A & P in the United States District Court for the Eastern District of Illinois on substantially the same charges. On September 16, 1946, Judge Lindley found the defendant guilty as charged and fined A & P $175,000.[12] The conviction was affirmed by the Court of Appeals for the Seventh Circuit on February 24, 1949, and the A & P Company announced that it would not appeal further.[13]

On September 15, 1949, the Attorney General filed a civil action based upon the criminal conviction in the United States District Court for the Southern District of New York, asking for

> the complete and perpetual separation of the business of manufacturing and processing food and food products now conducted by the defendants from the business of buying and selling food.[14]

The petition also asked for the horizontal and vertical dissolution of A & P. Final judgment without trial was consented to by the Government and the defendants on January 19, 1954.[15]

While these proceedings involved the status of the large corporate buyer under the Sherman Act, the liability of such a buyer as a recipient of discriminatory price concessions under Section 2 (f) of the Robinson-Patman Act was tested in a complaint brought in 1950 by the Federal Trade Commission against the Automatic Canteen Company.[16] At the hearing, the Commission introduced evidence that Automatic received, and in some instances solicited, prices that it knew were as much as thirty-three per cent lower than prices granted to other buyers. Automatic moved to dismiss the complaint on the ground that the Commission, on such a showing, had not made a prima facie case, but this was denied; and on Automatic's failure to introduce countervailing evidence, the Commission entered a cease and desist order.[17] The Court of Appeals for the Seventh Circuit affirmed.[18]

The Supreme Court, fearing that the opinion of the Federal Trade Commission was susceptible of the interpretation that every buyer violated Section 2 (f) if he accepted a discount which the seller could not justify, reversed. A buyer cannot be required to prove cost saving by the seller,

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[11] United States v. Safeway Stores, Inc., Cr. 7196, CCH Trade Reg. Rep. (Supp. 1941-1943) ¶52,976; United States v. The Kroger Grocery & Baking Co., Cr. 7197, CCH Trade Reg. Rep. (Supp. 1941-1943) ¶52,976.

[12] United States v. N. Y. Great Atlantic & Pacific Tea Co., 67 F. Supp. 626 (E. D. Ill. 1946).

[13] 173 F. 2d 79 (7th Cir. 1949).

[14] Civil No. 52-139, S.D.N.Y., Sept. 15, 1949.

[15] Consent Decree, Jan. 19, 1954.

[16] In the Matter of Automatic Canteen Co., 46 F.T.C. 861 (1950).

[17] *Ibid.*

[18] The Automatic Canteen Co. v. The Federal Trade Commission, 194 F. 2d 433 (7th Cir. 1952).

the Court said, and a buyer does not violate Section 2 (f) if the low prices he induces are either within one of the defenses of the seller or are not known by him *not* to be within one of these defenses. Proof that the buyer knew that the price he received was lower than that offered other buyers was, thus, held insufficient to shift to the buyer the burden of introducing evidence to show justification.[19]

The fact that the officers and agents of Automatic were not only aware that they were getting discriminatory discounts, but that they insisted upon them, underscores the fact that the Supreme Court is still unwilling to apply a *per se* test where a legitimate distinction may be drawn between good faith purchasers and dominant, aggressive buyers. The reversal by the Court emphasizes the threatened danger of placing an arbitrary burden of proof on *bona fide* purchasers, and limits, as a result, the effective scope of Section 2 (f) of the Robinson-Patman Act.

Essentially, thus, the prosecution of the Automatic Canteen Company failed for want of sufficient proof of knowledge of the illegal character of the alleged preferences. The suit against A & P, on the other hand, disclosed a plethora of adequate evidence which was introduced on this point at the trial. In contrast to the lack of success in *Automatic Canteen*, therefore, the success of the prosecution of A & P indicates that the activities for which A & P was convicted might have been condemned as well under the Robinson-Patman Act.

The effect of the two decisions when placed in juxtaposition illustrates a two-fold dilemma for chain stores. Not only must they carefully heed the specific prohibitions of the Robinson-Patman Act, but they must also avoid too patent a frustration of these proscriptions or face the threat of prosecution for violation of the Sherman Act. Avenues of escape which previously may have existed thus seem to have been foreclosed.

The significance of this novel and hitherto nascent potential of the Sherman Act justifies a close scrutiny of the organization and operations of A & P as well as an evaluation of the basis of its conviction and the theory behind its prosecution, because in it lies the key to the law and policy which will determine the outside of the Safeway litigation.

Special emphasis must be placed upon the fact that Safeway is being prosecuted under both the Sherman and the Robinson-Patman Acts, particularly in the light of the fact that under Section 1 of the Sherman Act, as applied in A & P, the shifting of the burden of proof which failed in Automatic Canteen under Section 2 (f) of Robinson-Patman can be accomplished.

The effectiveness of the coverage of the price discrimination and price cutting fronts which can be accomplished by prosecution on this alternate basis may prove to be a further source of attack by the critics of the A & P decisions. It has been argued that in and of itself the A & P

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[19] 346 U. S. 61 (1953).

prosecution struck at integration *per se* and not merely its abuses.[20] This is shocking, if true, because it must then be predicated upon the illegality of mass distribution in an age of mass production. Therefore, the attacks in the courts on the activities of chains may be denounced as both misguided and excessive if they strike directly at the efficiency achieved by chains through integration, and, to that degree, extend to unprecedented lengths the protection to be afforded small and independent business, whether economically efficient in the market place or not.

If, on the other hand, past decisions and decrees indicate an intent to circumscribe only the abuses of integration—and it will later be shown that many commentators do not so interpret them—then the result of the Safeway litigation should be more easily predicted. A reasonable prognostication, therefore, must be based on a close and detailed evaluation of the A & P case, which, in the light of the Safeway prosecution, affords a particular insight into this confused area of antitrust enforcement.

THE ORGANIZATION OF A & P

The Great Atlantic and Pacific Tea Company, at the time of the filing of the criminal information against it in 1944, was a monolithic organization, vertically and horizontally integrated, comprising twelve related corporations which did business in seven regional market areas. In 1948, it operated nationally approximately six thousand stores in thirty-nine states and the District of Columbia; its total sales on the retail level for the fiscal year ending February 28, 1948, were $2,837,291,185.[21] Its two nearest competitors, also operating on a national basis, were Safeway Stores, which operated 2103 stores in twenty-three states and the District of Columbia, with 1948 sales of $1,276,792,822,[22] and the Kroger Company, which operated 2349 stores in a nineteen-state area, with 1948 sales of $825,668,000.[23] Together, the three national chains sold 15.6 per cent of the national market and 20 per cent of all grocery and combination store sales; almost one-half of this figure, however, was controlled by A & P.[24]

The operating policy and practice of the A & P organization was to decrease the gross profit rate in the retail stores, along with costs, and thereby increase the volume of sales. A low profit rate insured low prices to the consumer and an increased volume of sales to A & P, which drove down the expense rate by spreading it further, thereby producing permanent and satisfactory net profits.[25]

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20 Adelman, *The A & P Case: A Study in Applied Economic Theory*, 63 Q.J. ECON. 238 (1949).

21 MOODY'S INDUSTRIALS, 1949, Vol. 21, No. 13, p. 2753.

22 *Id.* at 2631.

23 *Ibid.*

24 *Ibid.*

25 Fulda, *Food Distribution in the United States*, 99 U. PA. L. REV. 1051, 1125 (1951).

The implementation of this operational principle required a two-fold program of cutting margins of profits on the consumer level and cutting costs on the purchasing level, the latter objective being achieved by obtaining better terms from suppliers than other less integrated competitors could secure. A & P carried out both phases of this program aggressively.

(i) A & P as a Buyer of Manufactured Products.

By the dual threat either to withdraw their patronage or to enter into manufacturing for themselves, A & P obtained from its suppliers what the Government called "systematic discriminatory . . . preferences"[26] over its retail competitors in the purchase of manufactured and processed food and food products. A & P garnered price discounts and advantages whenever the opportunity presented itself and in whatever manner they became available. The legitimacy of seven of these practices was called into question at the trial.

Primarily, A & P sought lower prices at the purchasing level. In this area, its dual threat was most effective. A & P dealt primarily with small producers who became dependent upon the volume of A & P's custom for the economically successful operation of their businesses. Prior to 1939, for example, A & P took sixty per cent of Ralston-Purina's cornflake capacity at discounts totaling 7½ cents per case. In 1939, it informed Ralston of the results of a cost survey whereby A & P had discovered that it could save 21 cents per case by manufacturing cornflakes itself. The implication was not only obvious, but A & P made it explicit: either Ralston must grant A & P a lower price or it would be forced to enter into manufacture for itself. After six months of negotiation, Ralston increased its discount to 17½ cents per case, while discounts to other competitors remained 5 cents per case or less.[27] It is notable that similar tactics with larger producers did not achieve the desired result. Thus, after the failure of A & P to get substantial price reductions from Crisco and Spry, it ceased purchasing lard products from either company and commenced its own manufacture.[28]

A & P's policy with regard to brokerage discounts has already been outlined; at the trial, the Government charged that the pressure A & P brought to bear on its suppliers to abandon sales through brokers was in restraint of trade and hence a violation of the Sherman Act. Similar charges were advanced with regard to pressure by A & P to obtain remunerative advertising allowances. The practice of granting such allowances is quite customary in the trade, but it was charged that while A & P insisted upon enjoying the fruits of such contracts, it refused to be committed to the concomitant responsibility of performance. Thus,

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[26] Government Brief in the District Court, pp. 221 *et seq.*, United States v. N. Y. Great Atlantic & Pacific Tea Co., 67 F. Supp. 626. (E. D. Ill. 1946).

[27] Transcript of Record, Vol. 28, p. 5701, United States v. N. Y. Great Atlantic & Pacific Tea Co., 67 F. Supp. 626 (E. D. Ill. 1946).

[28] *Ibid.*

A & P was able to avoid the insertion in its advertising contracts of any specific criteria to which it would be contractually bound. It was admitted that A & P did an effective advertising job for its suppliers, but its shyness as to contractual specificity made it impossible for its suppliers to evaluate the monetary worth of A & P's efforts.

It is not questioned that A & P could, by virtue of the extent of its advertising activities, offer more advertising to its suppliers at lower cost. It is nevertheless true that as a result of the lower lineage rates that it obtained, A & P sold its advertising for far more than it cost and in 1940 alone, on this activity, made a profit of over two million dollars.[29]

Further criticism was leveled against so-called "Quantity Discount" and "Cost Savings" agreements which A & P entered into with its suppliers. The quantity discount agreements, drawn by A & P, denominated specific discounts which were to accrue to A & P by reason of the volume of its purchases. A & P, however, never obligated itself to purchase more than a "large quantity," and frequently, as a result of diversified carload and less-than-carload lots, the savings granted bore little relation to cost justifications.[30]

The cost savings agreements, also drawn by A & P, committed the seller to pass along to A & P "the savings in the seller's cost of manufacture, sale, and delivery, *other than brokerage,* in the form of a discount or allowance . . . from the . . . regular price."[31] In both agreements, the seller warranted that the discounts and cost savings granted were available to all other buyers on proportionately equal terms and that they did not reflect brokerage. The immediate purpose of the draftsmanship of these contracts was to assure A & P safety from prosecution under the Robinson-Patman Act by the Federal Trade Commission. The fact that A & P procured the signing of these contracts by coercion of its suppliers, however, coupled with the unfortunate proof offered at the trial that in many instances these contracts were sent to suppliers with the discount percentages already entered by A & P's buying offices, again triggered the charge of restraint of trade and brought A & P within the proscriptions of the Sherman Act.

Finally, certain unrelated occurrences served to reinforce the conclusion that A & P was abusing its purchasing power. Thus, A & P was found to have been able to effect a discontinuance of premium deals and store-door deliveries to its competitors.[32] It was also able to obtain larger label allowances than its competitors to compensate for the higher label cost which A & P occasioned by using more elaborate labels on the unbranded goods which it purchased.[33]

29 Fulda, *op. cit. supra* note 25, at 1091 n. 163.

30 Appendix A to Defendant's Brief on Appeal, Vol. II, p. 177, United States v. N. Y. Great Atlantic & Pacific Tea Co., 173 F. 2d 79 (7th Cir. 1949).

31 Transcript of Record, *op. cit. supra* note 27, Vol. 12, p. 2773.

32 173 F. 2d at 83.

33 67 F. Supp. at 654.

Not only was A & P able to secure by these practices manufactured goods at substantially lower cost than its competitors, but it was also able, through the collection of the various contractual allowances and discounts, to aggregate a fund of resources at its headquarters' offices, the use of which on the retailing level was one of the bases for conviction.

The suspicious nature of these transactions was further heightened by the secrecy in which they were cloaked. It was, of course, essential both for the market position of A & P's suppliers as well as for the maintenance of A & P's price advantage that these preferences be kept as confidential as possible. But the very element of secrecy requisite to secure its competitive advantage served to reinforce the Government's position that A & P was knowingly receiving discriminatory and unjustifiable preferences which placed competitors in a non-competitive position.

(ii) A & P as a Buyer of Fresh Fruits and Produce.

The purchasing of all of A & P's requirements of fresh fruits, vegetables, and produce was handled by its wholly-owned subsidiary, the Atlantic Commission Company. ACCO acted both for A & P and for the outside trade and filled the heterogeneous functions of buyers' broker, sales broker, and direct buyer for A & P. Seventy-five per cent of its capacity was directed toward procuring the Company's requirements while the remaining twenty-five per cent of its activity was with outside purchasers and sellers. Because of the phenomenal completeness of its nationwide market information, ACCO was able to purchase at the lowest possible prices, and because of the volume of its purchases, it was able to procure the highest possible discounts. Indeed, ACCO was such a valuable customer on the one hand and such a valuable broker on the other that it was able to require all purchasers to deal with it exclusively, and in both situations it was able to collect brokerage, or its equivalent. And in both situations, the threat of withdrawal of its patronage or its services was sufficient to insure the payment of its usual fees, even when its facilities were not utilized.[34]

The function of ACCO as buying agent for A & P as well as for the outside trade enabled the organization to dispose of the excess of its purchases over the requirements of A & P, while at the same time assuring A & P that its produce would always be of top quality and available when required. The natural result of such a situation was to create not only a dual quality but also a dual price structure, the latter because A & P was not required to pay the fees collected by ACCO in its dealings with the outside trade.[35]

Further, this inherent price differential was augmented by the purchasing methods of ACCO, which demanded from shippers the cost savings accruing from "cash" rather than "regular term" purchases and then secured rebates when the produce purchased on cash terms did not arrive

[34] Government Brief in the District Court, *op. cit. supra* note 26, at 245.
[35] 173 F. 2d at 85.

at destination in U. S. Grade No. 1 condition. Finally, ACCO did all of its purchasing for A & P on this insured-cash basis, but for the rest of the trade it purchased only on a regular term basis.[36]

Judge Lindley found the operations of ACCO amounted to a substantial violation of the Sherman Act, tainting all of A & P's operations, and upon it he predicated the conviction.[37] While the Court of Appeals felt that the basis and justification of the prosecution was broader than this, it nevertheless held ACCO to be a general "conspiracy to establish a two-price level at the buying level, which enables A & P to meet its competition with an enormous advantage at the retail level."[38]

(iii) A & P as a Seller.

At the retail level, A & P implemented its operating policy of increased volume and proportionately smaller expense rate per item by selling at marginal gross profit rates. The directors of A & P felt that their proper retail objective should be twenty-five per cent of the retail sales of groceries, produce, and food products in every town in the United States with a population under 400,000, and fifteen per cent of the sales in all towns over 400,000. Their retail program was aggressively aimed at the consummation of this purpose.[39]

All of the savings accomplished in the manufacturing and purchasing operations were collected at the headquarters' offices and thereafter allocated on a tonnage basis to the various retail divisions to support their selling program. To achieve the desired volume in critical areas, retail units were allowed to operate constantly at a loss, and while this generally reflected operations below the cost of doing business it at times indicated operation below replacement cost. The fact that in some instances, however, sales were at less than purchase price served as a basis for the Government's charge that A & P was practicing recoupment of losses by the balancing of losses in some areas by increased prices in others.[40]

Some stores in critical areas operated in the red for more than four years on this basis. In other areas, short-term losses were suffered so that particular units could reduce their prices three weeks before a competitor was about to open near an established A & P store and maintain them at this low level until three weeks after the projected opening.[41] The Company sought to justify this practice as a *bona fide* attempt to minimize the losses in volume that could be anticipated from such openings, but here again, particular instances of threats by local managers to run competitors out of business were deemed to furnish a reasonable basis for the

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[36] Fulda, *Food Distribution in the United States*, 99 U. PA. L. REV. 1051, 1144 n.405 (1951).

[37] 67 F. Supp. at 658.

[38] 173 F. 2d at 87.

[39] Transcript of Record, Vol. 68, p. 16,098, United States v. N. Y. Great Atlantic & Pacific Tea Co., 67 F. Supp. 626 (E. D. Ill., 1946).

[40] *Id.* Vol. 46, pp. 9991-92.

[41] *Id.* Vol. 51, pp. 11,438-39.

inference that A & P's localized price cutting was inspired by predatory intentions.[42]

Further, the practice of sanctioning buying brigades, particularly in the Southern Division where competition was most severe, to buy out all items sold by competitors as loss leaders if the price was less than A & P's replacement cost and then to offer them as a special the next day at a three per cent mark-up, helped to support the conclusion that while many stores in direct competition with A & P went out of business for lack of capital or lack of experience, many others were victims of A & P's predatory pricing program.

CRITICISM OF THE A & P CONVICTION

The Government contended that this evidence showed an abuse of combined vertical and horizontal integration on both the purchasing and retailing levels. It charged that A & P, by illegal methods, coerced systematic discriminatory buying preferences, with the necessary result that sellers who granted such illegal discounts and allowances were forced to recoup their losses by charging A & P's competitors more.[43] Further, the Government argued that the Company misused the funds obtained on the purchasing level by supporting predatory pricing in selected areas through selling below the cost of doing business to eliminate and destroy competition. The Government argued that this "subsidizing" of particular units with headquarters' "profits" constituted an unfair and illegal pricing advantage not open to less integrated competitors who could not afford to balance losses in one area with gains in another. The illegality of operation in selected areas so as to undersell and destroy competitors through the use of buying brigades was an "illegal usurpation of power over the methods of business employed by competitors and is a restraint upon trade."[44]

The most vocal critic of the A & P conviction charges that integration itself, and not its abuse, was condemned. This attack is predicated upon the emphasis which was placed upon the illegality of A & P's practice of subsidizing local operations with funds aggregated at the headquarters' offices. "Subsidies" and "integration," it is urged, are but "two names for the same thing,"[45] and transfers of earnings from any one stage of a business operation to any other are merely bookkeeping entries and not business fact. This argument is buttressed by the fact that A & P's manufacturing subsidiaries did not sell nor did the regional warehouses purchase from them in any realistic sense.

It is further argued that the fact that advertising allowances, cost

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[42] *Id.* Vol. 51, pp. 11,574-75.

[43] Government Brief in the District Court, p. 1075, United States v. N. Y. Great Atlantic & Pacific Tea Co., 67 F. Supp. 626 (E. D. Ill. 1946).

[44] *Id.* at 827.

[45] Adelman, *The A & P Case: A Study in Applied Economic Theory*, 63 Q. J. ECON. 238, 246 (1949).

savings, and quantity discounts were aggregated in one office, and then proportionately allocated, does not make them subsidies. This, it is said, occurred again only from an accounting standpoint because of the legitimate cost savings that could be accomplished by centralized purchasing and advertising. Hence, it is argued, the charge of below cost selling relied upon an accounting fiction which does not accurately reflect the fact that all of these items should apply to reduce the cost of goods sold. The only possible illegality, it is therefore argued, lay in A & P's accounting methods, which, for sound business and accounting reasons, temporarily placed local units in the red and then returned them to the black.[46]

Finally, according to the critics, the theory of necessary recoupment, so heavily relied upon by the Government in its theory of the illegality of A & P's purchasing and retailing methods, is perhaps helpful in the abstract analysis of economic continuums under perfect competition, but to transfer it from the theoretically abstract to the concretely realistic and to attempt to apply it as a yardstick of antitrust violation is "inherently absurd."[47]

Specifically, it is argued that most of A & P's retail price differentiation was truly a meeting of competition, and that those units which ran at a loss for substantial periods did so in an effort to meet the far more aggressive competition of local chains and supermarkets. Many of the instances of price cutting, it is said, were made in response to the opening of new stores by competitors, and since the response to competition, actual or potential, is an important factor in workable competition, the conviction cannot stand on this basis alone.[48] It is submitted that this is a valid and cogent argument, and the Government and the courts are to be criticized for their failure to disentangle theory from practice and to distinguish more clearly between instances of "competitive" and "predatory" price cutting. This failure, however, although unfortunate for a clear understanding of the government's theory of the violation, is hardly justification for a complete condemnation of the conviction. There were numerous instances of patently predatory price cutting, sufficient to sustain a conviction under the Sherman Act, regardless of the failure so to distinguish.[49]

Secondly, it is argued that the dual threat of A & P either to withdraw its patronage or to initiate manufacture itself was not only a valid by-product of integration but that it improved competition in general by driving down prices over the entire market.[50] A & P's negotiations with Ralston-Purina are cited in this regard. It must be noted, however, that

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46 *Ibid.*

47 Adelman, *Integration and Antitrust Policy,* 63 HARV. L. REV. 27, 59 (1949).

48 DIRLAM AND KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY (Cornell University Press, Ithaca, New York, 1954), p. 212.

49 67 F. Supp. at 669 *et seq.*

50 Adelman, *The A & P Case: A Study in Applied Economic Theory,* 63 Q. J. ECON. 238, 254 (1949).

while Ralston did lower its prices, it lowered them disproportionately in favor of A & P as against other purchasers, and it is significant that the efforts of A & P were successful only against smaller sellers who had weakened their market positions by heavy dealings with A & P.[51]

It is further argued that the criticism of the large advertising allowances granted to A & P ignores the fact that joint advertising with A & P not only provided the seller with more effective advertising but that it offered it to him at a price substantially cheaper than he could obtain for himself. Hence, it is felt, the profit accruing to A & P as a result of these contracts is merely ancillary and cannot *ipso facto* be criticized.[52]

It is theoretically difficult to dispute this contention when stated in the abstract. On initial consideration, the benefit which A & P derived from its advertising contracts seems a legitimate increment of size and integration. Practically, however, it fails to meet the point in issue. A & P's advertising contracts were most extraordinary; they promised no more than "we will advertise."[53] This indefinite consideration was coupled with a positive reluctance to be tied down to any specific performance. At best, therefore, the undertaking contracted for was vague and ill-defined. Indeed, a vice-president of A & P admitted on the stand that he was personally opposed to advertising allowances because they were not offered on an equitable basis, since no yardstick had ever been devised by the company to measure the performance rendered and to correlate it with the allowance granted.[54]

In the final analysis, therefore, it was not the legitimacy of the advertising contracts which was criticized nor the existence of profits resulting from them. It was, rather, the absence of contractual specificity and the misuse of the funds on the retail level which brought A & P within the domain of the Sherman Act and thereby precipitated Government action.

Finally, it is asked why it is wrong for a firm to do its own buying and obtain, as a consequence, a more favorable price. In this regard, the theory has even been advanced that if A & P is not allowed to receive such discounts, the only possible result must be to enforce systematic patterns of price discrimination *against* A & P, which thereby weakens the full force of competitive pressures on sellers.[55] It is therefore concluded that if the utilization of A & P's buying power is not legitimate, then integration is *per se* illegal, and if A & P's price cutting is a violation

[51] DIRLAM AND KAHN, *op. cit. supra* note 48, at 235.

[52] Adelman, *The A & P Case: A Study in Applied Economic Theory,* 63 Q. J. ECON. 238, 253 (1949).

[53] Government Brief in the District Court, *op. cit. supra* note 43, at 344; Appendix B to Defendants' Brief on Appeal, Vol. II, pp. 167-8, United States v. N. Y. Great Atlantic & Pacific Tea Co., 173 F. 2d 79 (7th Cir. 1949).

[54] Transcript of Record, *op. cit. supra* note 39, Vol. 88, pp. 20,335-36, 20,342.

[55] Adelman, *The A & P Case: A Study in Applied Economic Theory,* 63 Q. J. ECON. 238, 249 (1949).

of the antitrust laws, then most price competition, where profit margins are narrow, is proscribed.[56] Such an analysis is crucial if the conviction of A & P rests entirely upon the erroneous application of economic theory by the Government and the courts; it would appear superficial if it avoids the concrete evidence contained in the record of the unfair use of the power inherent in A & P's monolithic integration.

Evaluation of the A & P Opinions

A & P was convicted of monopolizing, and, it would appear, properly so. The courts found in the evidence a consistent course of action and policy involving abuse of bargaining power and strategic position over competitors by virtue of size and the geographic dispersion of operations. Judge Lindley found most of the buying advantages tainted in their source, being the products of coercive bargaining; he condemned them as deliberately misused at the retail level by operation on unusually low and at times economically unjustifiable retail margins in selected areas, with the specific purpose of "putting the heat on" competitors. That these findings were sustained by adequate proof there can be little doubt.

But, neither the Government nor the courts consistently differentiated the economically beneficial and the legally reasonable from the undesirable and unreasonable aspects of A & P's organization and tactics, *and their consequences.*[57] The opinions of Judge Lindley, and of Judge Minton on appeal, demonstrate a tendency to criticize the quest for bargains and discounts, whether justified by cost savings or the performance of valid functions or not. Both opinions appear to question the legality of efficient vertical and horizontal integration *per se* by their failure to distinguish between the legal and the illegal aspects of ACCO's operation and of A & P's other subsidiaries.[58] They contain, instead, a blanket disapproval of the "subsidizing" of retail units with headquarters' "profits." Finally, both opinions reprove any regional discrepancies in margins without separating the promotional and defensive from the predatory in the industry as a whole.

The exclusion of all of these factors at the trial, on the basis that they were immaterial, emphasizes the extent of the departure in the A & P Case from the traditional Sherman Act "rule of reason" which required a complete examination of the effects and consequences upon either the entire market or at least a significant part of it. In its steadthere was applied a new Sherman Act requiring very little in the way of a configuration of the total market picture except a demonstration of a course of conduct which in and of itself is characterized as betraying an intent to monopolize.

At best this failure to distinguish between the permitted and the proscribed has thoroughly muddled the picture. It has provided the

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[56] *Id.* at 251.
[57] Dirlam and Kahn, *op. cit. supra* note 48, at 73.
[58] *Id.* at 73-8.

foundation upon which some critics have denounced the conviction as a direct attack upon efficient vertical integration while denying other critics a clear basis upon which to endorse the prosecution as a proper and legitimate control of the *abuses* of integration. It further tends to blur a determination of whether the Sherman Act as applied has the potentiality of superseding the Robinson-Patman Act in this area or whether the Government and the courts intended only that it reinforce Section 2(f) by providing for the shift in the burden of proof which had failed in *Automatic Canteen.*

Finally, the Government and the courts failed to differentiate between injuries to particular competitors and a monopolistic threat to competition in general. Not only does this seem to frustrate the purpose of the distinction between the Robinson-Patman and the Sherman Acts, making, as Judge Lindley suggested, a nullity of the Robinson-Patman Act,[59] but it has also fostered confusion by leaving buyers in doubt as to their responsibility under Section 2(f) of the Robinson-Patman Act on the one hand and under the Sherman Act on the other.[60]

The Civil Suit and the Consent Decree

As previously noted, on September 15, 1949, the Attorney General filed a civil suit against A & P in the United States District Court for the Southern District of New York. He asked for the complete vertical and horizontal dissolution of A & P, divestiture of all of its manufacturing facilities, elimination and dissolution of the Atlantic Commission Company and A & P's central buying offices, and severance of the retailing divisions into seven wholly independent companies.[61]

The proposed dissolution created sharp controversy. Many critics who had supported the criminal prosecution of A & P as a justified application of the antitrust laws to control the abuses of integration must now have reexamined the urgent warnings that the criminal prosecution of A & P was a direct challenge to the legality of efficient integration. Dissolution, always a last resort in antitrust enforcement,[62] seemed a remedy more drastic than the abuses of integration which it sought to correct, and the proposal encountered violent and widespread criticism.[63]

Proponents of the dissolution argued that there would be no public harm resulting from such a course, because the low-price structure of A & P's operation could be maintained by carload buying, with the concommitant public savings accruing from such purchasing, but without the opportunity or the possibility of a repetition of A & P's past coercive

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[59] 67 F. Supp. at 676.

[60] See Dirlam and Kahn, *op. cit. supra* note 48, at 253-56.

[61] CCH Trade Reg. Rep. (1948-1951) ¶61,226.

[62] United States v. United States Steel Corp., 251 U. S. 417 (1920); Timken Roller Bearing Co. v. United States, 341 U. S. 593 (1951); United States v. United Shoe Machinery Co., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam,* 347 U. S. 521 (1954).

[63] Dirlam and Kahn, *op. cit. supra* note 48, at 166.

tactics. Further, they felt that the seven retailing organizations which would result, each with a projected annual retail volume of $400,000,000, would still have the requisite efficiency and buying power without being under the direct control of a headquarters' office. They predicted that this would create rather than restrict the dynamicism of A & P's operations by eliminating the necessity for maintaining a national market position by defensive, predatory pricing.[64]

Opponents of the proposal, however, asked whether the break-up of A & P was either a necessary or a proper remedy to effectuate the purpose of the Sherman Act. It was suggested that an injunction prohibiting further abuse might be sufficient to restore healthy competition without the necessity of sacrificing the efficiency of A & P's operation and integration.[65]

The consent decree as entered was more or less a compromise between these two positions and was much less drastic than the Government's original proposal. It encompassed twelve points of reformation and control: (1) A & P was ordered to dissolve ACCO, and any successor to ACCO was enjoined from selling or dealing with the outside trade; (2) A & P was enjoined from selling any food to the outside trade except food manufactured or processed by subsidiaries of A & P or food disposed of by salvage sale; (3) A & P was enjoined from selling any food manufactured by its subsidiaries to the outside trade except at prices no higher and on terms no less favorable than it sold to itself; (4) A & P was prohibited from acting as buying agent, auction seller, or broker for the outside trade; (5) A & P was prohibited from dictating systematically to suppliers to refrain from selling through brokers, to discontinue premium deals or store-door deliveries or to increase prices to the outside trade; (6) A & P was prohibited from dictating systematically to suppliers, prices, terms, or conditions of sale, except at arm's length; (7) A & P was enjoined from receiving or accepting label allowances in excess of that offered to the outside trade, even though its costs were greater; (8) A & P was enjoined from knowingly receiving any discount or allowance determined on a quantity basis for sales or shipments to more than one retail unit, except that such prices might reflect the savings on labels for more than one unit's purchases, and except for carload savings actually shared by more than one unit; (9) A & P was directed to abandon the use of its contract forms for quantity discounts and cost savings allowances; (10) Headquarters was enjoined from accepting or aggregating any payments or allowances; (11) A & P was prohibited from assigning gross profit rates so as to operate any division at a loss for the purpose of destroying or eliminating competition; and (12) A & P was ordered and directed to give the Antitrust Division reasonable access to all its

[64] *Id.* at 166-69.

[65] Fulda, *Food Distribution in the United States*, 99 U. PA. L. REV. 1051, 1161-62 (1951).

books and to allow the interview of employees to ensure that the decree was being carried out.

Evaluation and criticism of the decree as finally entered has been varied. One writer concludes that the multiplicity of directives that are laid down with regard to the buying and selling activities of A & P makes the proper enforcement of the decree by the Department of Justice a practical impossibility. He fears, however, that under the shadow of the injunction, extending as it does to the minutest detail of its operations, there is real danger that the decree will turn A & P into a timid competitor and result in putting it at a competitive disadvantage in buying and selling policies.[66] In direct contrast is the opinion of another critic who feels that the consent decree accomplishes next to nothing and that it is padded with meaningless provisions which add up to little more than a promise by A & P that it will obey the law on price discrimination.[67]

But whatever else may be said of the decree, it settled one question conclusively: all of the prohibitions were clearly aimed at prohibiting future systematic coercion of lower prices through abuse of buying power and at prohibiting the misuse of aggregated funds for predatory pricing tactics. With the possible exception of the eighth and tenth provisions, as outlined above, which have overtones of limitations on integration possibly going beyond the mere restaint of abuse,[68] the decree is aimed solely at the prohibition of future abuse and the dissolution of ACCO.

Direct attack upon chains because of their size or efficiency alone, therefore, was precluded by the decree. It would be hard to imagine that A & P would have consented to this decree had they not felt that it embodied mutual recognition that dissolution was unnecessary as well as excessive. As a result, the decree embodies workable standards of activity to prevent future abuse which are indicative as the best yardstick to date for measuring the legality of specific operating practices.

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[66] DIRLAM AND KAHN, *op. cit. supra* note 48, at 169.

[67] Adelman, *Corporate Integration, How to Comply with the Antitrust Laws, Antitrust Law Symposium* (CCH, New York, 1954), p. 298 n. 28.

[68] The eighth provision of the Consent Decree, as outlined in the text *supra*, restricts quantity discounts and allowances to those based on sales and shipments to a single retail unit, except as to label allowances and carload savings resulting from shipments actually shared by more than one unit. In prohibiting A & P from earning quantity discounts by coordinated buying, the decree goes beyond protection against the possibility of prospective abuse and prevents A & P from enjoying what theoretically would be regarded as a legitimate advantage of integration. It must be remembered, however, that this harsh restriction was perhaps felt to be justified protection against a repetition of the collection of quantity discounts, as A & P had done in the past—discounts which were measured by total purchases or total division purchases and which often did not reflect actual or justifiable cost savings to the supplier.

Similarly, the tenth provision, in enjoining A & P Headquarters from accepting or aggregating payments or allowances, also strikes at a prospective abuse which might have been felt probable in the light of A & P's purchasing history.

CONCLUSION

The particular lesson to be learned from the success of the prosecution of A & P is that any calculated attempt to push to the very limit of aggressive warfare with small competitors is a dangerous gamble on the part of a giant enterprise. Since all lines of demarcation are at best hazy, the consent decree is presently the only reliable guide for the determination of future controversies such as the pending Safeway litigation.

Certainly, the A & P decisions and the consent decree have indicated specific prohibited activities. Regardless of *Automatic Canteen*, there is still danger that knowledge of discriminatory pricing will be imputed to a large, well-integrated buyer. It is dichotomous for a dominant and aggressive organization to plead ignorance of competitive prices and sooner or later the Supreme Court will so hold. Therefore, acceptance of allowances and discounts which cannot be justified on a service, function, or unit-quantity basis must be considered suspect under present standards. Further, collection or crediting of brokerage; dictation of costs, prices, or business practices; the sanction of buying brigades; the insistence upon or receipt of excessive advertising allowances; and the use of quantity discount and cost savings agreements, which are unsupported by cost justification and which shift the responsibility for violation of the antitrust laws, are clearly proscribed buying practices.

Similarly, careful consideration of the indeterminate boundaries of sanctioned activities requires a distinction to be drawn between a continuing low-price policy under the continuous threat of new entrants into competition, which is plainly an element of workable competition, and sporadic destructive price cutting only on specific occasions and in specific areas in which entrants emerge or threaten to emerge. Thus, predatory pricing tactics, sales below replacement cost, recoupment of deficits in one area by raising prices in another, and destructive price cutting are also prohibited selling practices.

When viewed from this perspective, it would appear that the conviction of A & P was proper and was sustained by adequate proof. In so far as certain language existed in the opinions which tended to create a danger of the proscription of the benefits of size and integration *per se*, it has been precluded by the translation of the conviction on the criminal charge into specific standards of proscribed practice in the consent decree. And even if the Government and the courts failed to distinguish between legal and illegal practices, the chains may feel confident that they will not be attacked on any other basis than that of abusive price discrimination and predatory price cutting which tend either to lessen competition or to create a monopoly in a limited degree. It is hoped that this conclusion may serve to clarify an area of antitrust enforcement that has caused more than its due share of confusion. In any event, the particular insights afforded by the A & P decisions and the consent decree should be heeded in evaluating the nature of antitrust violations in this area, and further developments in the pending Safeway litigation should be awaited with great interest since they may either confirm or confuse the lessons which emerge from past prosecutions and convictions.

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